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Case No. 001/18-07-2008/ECCC/OCIJ

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**ANNEX A**

**AUTHORITY 45**

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**UNITED  
NATIONS**

International Tribunal for the  
Prosecution of Persons Responsible  
for Serious Violations of International  
Humanitarian Law Committed in the  
Territory of Former Yugoslavia since  
1991

Case No. IT-03-66-T

Date: 30 November 2005

Original: English

**IN TRIAL CHAMBER II**

**Before:** Judge Kevin Parker, Presiding  
Judge Krister Thelin  
Judge Christine Van Den Wyngaert

**Registrar:** Mr Hans Holthuis

**Judgement of:** 30 November 2005

**PROSECUTOR**

v.

**FATMIR LIMAJ  
HARADIN BALA  
ISAK MUSLIU**

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**JUDGEMENT**

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**The Office of the Prosecutor:**

Mr Alex Whiting  
Mr Julian Nicholls  
Mr Colin Black  
Mr Milbert Shin

**Counsel for the Accused:**

Mr Michael Mansfield Q.C. and Mr Karim A.A. Khan for Fatmir Limaj  
Mr Gregor D. Guy-Smith and Mr Richard Harvey for Haradin Bala  
Mr Michael Topolski Q.C. and Mr Steven Powles for Isak Musliu

Chamber is binding on Trial Chambers.<sup>590</sup> The Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reason in the interests of justice.<sup>591</sup> Contrary to the submissions of the Defence, Trial Chambers may not depart from previous rulings of the Appeals Chamber.

179. In view of the above, the Chamber finds no need to discuss the Defence submissions in this respect any further. It will proceed on the basis of the Appeals Chamber jurisprudence establishing that with respect to serious violations of Common Article 3 the four *Tadić* conditions are met. The Chamber refers to its findings made elsewhere that the victims detained in the prison camp were not at the relevant time taking an active part in the hostilities,<sup>592</sup> and, therefore, finds that in the present case the jurisdictional prerequisites of Article 3 of the Statute have been established.

## **B. Jurisdiction under Article 5**

### 1. Law

180. A crime listed in Article 5 of the Statute constitutes a crime against humanity only when “committed in armed conflict”.<sup>593</sup> This requirement translates into a need for proof that there was an armed conflict at the relevant time and place, and that, objectively, the acts of the accused are linked geographically, as well as temporally, with the armed conflict.<sup>594</sup> Proof of a nexus between the underlying crimes and the armed conflict is not required. Although the acts or omissions must be committed in the course of an armed conflict, the only nexus required is that between the acts of an accused and the attack on the civilian population (a concept discussed in the following paragraphs).<sup>595</sup>

181. To qualify as crimes against humanity the acts of an accused must be part of a widespread or systematic attack “directed against any civilian population”. It is established in the jurisprudence of the Tribunal that the general elements required for the applicability of Article 5 of the Statute are that: (i) there must be an attack; (ii) the acts of the perpetrator must be part of the attack; (iii) the attack must be directed against any civilian population; (iv) the attack must be widespread or systematic; and (v) the perpetrator must know that his or her acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his or her acts

<sup>590</sup> *Aleksovski* Appeals Judgement, para 113.

<sup>591</sup> *Aleksovski* Appeals Judgement, para 107.

<sup>592</sup> *See infra*, paras 279; 331; 340; 348; 359; 367; 376; 384; 398; 410; 415; 419; 423; 427; 430; 433; 436; 440 and 444.

<sup>593</sup> *Kunarac* Appeals Judgement, paras 82 and 86.

<sup>594</sup> *Tadić* Appeals Judgement, para 251; *Kunarac* Appeals Judgement, para 83; *Kordić* Trial Judgement, para 23.

<sup>595</sup> *Kordić* Trial Judgement, para 33.

fit into such a pattern (*i.e.* knowledge of the wider context in which his or her acts occur and knowledge that his or her acts are part of the attack).<sup>596</sup>

182. The concepts of “attack” and “armed conflict” are distinct and separate notions, although, under Article 5 of the Statute, the attack on any civilian population may be part of an armed conflict.<sup>597</sup> An attack has been defined as a course of conduct involving the commission of acts of violence.<sup>598</sup> Perhaps more usefully, in the context of a crime against humanity, the term “attack” is not limited to the use of armed force but also encompasses any mistreatment of the civilian population.<sup>599</sup> It can precede, outlast, or continue during the armed conflict, thus it may be, but need not be, part of the armed conflict as such.<sup>600</sup>

183. The attack must be either widespread *or* systematic, the requirement being disjunctive rather than cumulative.<sup>601</sup> The term “widespread” refers to the large scale nature of the attack and the number of victims, while the phrase “systematic” refers to the organised nature of the acts of violence and the improbability of their random occurrence.<sup>602</sup> The Appeals Chamber has stated that patterns of crimes, namely the non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrence.<sup>603</sup> In the Appeals Chamber’s view,

“the assessment of what constitutes a ‘widespread’ or ‘systematic’ attack is essentially a relative exercise in that it depends upon the civilian population which, allegedly, was being attacked. A Trial Chamber must therefore ‘first identify the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon the population, ascertain whether the attack was indeed widespread or systematic’. The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes, could be taken into account to determine whether the attack satisfies either or both requirements of a ‘widespread’ or ‘systematic’ attack vis-à-vis this civilian population.”<sup>604</sup>

184. The existence of a policy or plan (or that the crimes were supported by a policy or plan to carry them out) may evidentially be relevant, but is not a legal requirement, to establish the widespread or systematic nature of the attack and that it was directed against a civilian population.<sup>605</sup>

<sup>596</sup> *Kunarac* Appeals Judgement, para 85.

<sup>597</sup> *Vasiljević* Trial Judgement, para 30; *Kunarac* Appeals Judgement, para 86.

<sup>598</sup> *Naletilić* Trial Judgement, para 233.

<sup>599</sup> *Kunarac* Appeals Judgement, para 86; *Vasiljević* Trial Judgement, paras 29-30.

<sup>600</sup> *Kunarac* Appeals Judgement, para 86.

<sup>601</sup> *Kunarac* Appeals Judgement, para 97; *Naletilić* Trial Judgement, para 236; *Kunarac* Trial Judgement, para 431; *Kordić* Appeals Judgement, para 94. The Chamber notes that once it is convinced that either requirement is met, it is not obliged to consider whether the alternative qualifier is also satisfied, *Kunarac* Appeals Judgement, para 93.

<sup>602</sup> *Blaškić* Appeals Judgement, para 101.

<sup>603</sup> *Blaškić* Appeals Judgement, para 101, citing *Kunarac* Appeals Judgement, para 94.

<sup>604</sup> *Kunarac* Appeals Judgement, para 95 (footnotes omitted).

<sup>605</sup> *Kunarac* Appeals Judgement, para 98; 101. The Appeals Chamber considered that “neither the attack nor the acts of the accused needs to be supported by any form of ‘policy’ or ‘plan’ [...] It may be useful in establishing that the

185. The attack must be directed against a civilian population. As the Appeals Chamber has held,

“[t]he expression ‘directed against’ is an expression which ‘specifies that in the context of a crime against humanity the civilian population is the primary object of the attack.’ In order to determine whether the attack may be said to have been so directed, the Trial Chamber will consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war. To the extent that the alleged crimes against humanity were committed in the course of an armed conflict, the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst.”<sup>606</sup>

186. The Chamber recalls that there is an absolute prohibition against targeting civilians in customary international law.<sup>607</sup> The terms “civilian population” must be interpreted broadly and refers to a population that is predominantly civilian in nature. A population may qualify as “civilian” even if non-civilians are among it, as long as it is predominantly civilian.<sup>608</sup> The presence within a population of members of resistance armed groups, or former combatants who have laid down their arms, does not as such alter its civilian nature.<sup>609</sup> As a result, the definition of a “civilian” is expansive and includes individuals who at one time performed acts of resistance, as well as persons who were *hors de combat* when the crime was committed.<sup>610</sup> Relevant to the determination whether the presence of soldiers within a civilian population deprives the population

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attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be to prove these things by reference to other matters.” The Appeals Chamber therefore tempered the finding of the *Blaškić* Trial Chamber with respect to the requirement of the existence of a plan or policy. Note that the Trial Chamber in *Blaškić* held that “the systematic character refers to four elements which for the purposes of this case may be expressed as follows: 1) the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community; 2) the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another; 3) the preparation and use of significant public or private resources, whether military or other; 4) the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan (para 203). The Appeals Chamber held that the existence of a plan or policy may be evidentially relevant, but it is not a legal element of the crime, *Blaškić* Appeals Judgement, paras 100 and 120.

<sup>606</sup> *Kunarac* Appeals Judgement, para 91 (footnotes omitted); *Naletilić* Trial Judgement, para 235.

<sup>607</sup> *Blaškić* Appeals Judgement, para 109.

<sup>608</sup> *Jelisić* Trial Judgement, para 54; *Kupreškić* Trial Judgement, paras 547-549; *Naletilić* Trial Judgement, para 235; *Kordić* Trial Judgement, para 180; *Kupreškić* Trial Judgement, para 549; *Blaškić* Trial Judgement, para 214; *Jelisić* Trial Judgement, para 54.

<sup>609</sup> *Blaškić* Appeals Judgement, para 113. The Trial Chamber in that case was of the view (para 214) that the term ‘civilian’ population encompasses members of a resistance movement as well as former combatants (regardless of whether they wore uniform or not) provided they were no longer taking part in hostilities when the alleged crimes were perpetrated because they had either left the army or were no longer bearing arms or, ultimately, had been placed *hors de combat*, in particular, due to their wounds or their being detained. See also, *Jelisić* Trial Judgement, para 54; *Kordić* Trial Judgement, para 180 and *Naletilić* Trial Judgement, para 235.

<sup>610</sup> *Galić* Trial Judgement, para 143.

of its civilian character are the number of soldiers as well as whether they are on leave.<sup>611</sup> There is no requirement that the victims are linked to any particular side of the conflict.<sup>612</sup>

187. It has been emphasised in the jurisprudence of this Tribunal that the word “population” does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack.<sup>613</sup> It is established that the targeting of a select group of civilians – for example, the targeted killing of a number of political opponents – cannot satisfy the requirements of Article 5. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian “population”, rather than against a limited and randomly selected number of individuals.<sup>614</sup>

188. As the Appeals Chamber held in *Kunarac*, the required nexus between the acts of the accused and the attack, in effect, consists of two elements:

- the commission of an act which, by its nature or consequences, is objectively part of the attack; and
- knowledge on the part of the accused that there is an attack on the civilian population and that his or her act is part thereof.<sup>615</sup>

189. First, it must be proved that the alleged crimes were related to the attack on a civilian population occurring during an armed conflict. In other words, it must be established that the acts of the accused are not isolated,<sup>616</sup> but rather, by their nature and consequence, are objectively part of the attack.<sup>617</sup> The acts need not be committed in the midst of that attack provided that they are

<sup>611</sup> *Blaškić Appeals Judgement*, para 115.

<sup>612</sup> *Vasiljević Trial Judgement*, para 33.

<sup>613</sup> *Blaškić Appeals Judgement*, para 109; *Galić Trial Judgement*, para 143. In determining the scope of the term “civilian population,” it is necessary to ascertain the state of customary law in force at the time the crimes were committed, by taking into account in particular Article 50 of Additional Protocol I which provisions may largely be viewed as reflecting customary law and are therefore relevant to the consideration at issue under Article 5 of the Statute. See *Kordić Appeals Judgement*, para 97.

<sup>614</sup> *Kunarac Appeals Judgement*, para 90.

<sup>615</sup> *Tadić Appeals Judgement*, para 271; *Kunarac Appeals Judgement*, para 99. *Blaškić Appeals Judgement*, para 126; *Kordić Appeals Judgement*, paras 99-100; *Kunarac Appeals Judgement*, paras 99-102.

<sup>616</sup> A crime would be regarded as an ‘isolated act’ when it is so far removed from the attack that, having considered the context and circumstances in which it was committed, it cannot reasonably be said to have been part of the attack, *Kunarac Appeals Judgement*, para 100.

<sup>617</sup> *Kunarac Appeals Judgement*, para 96; *Kordić Trial Judgement*, para 178.

sufficiently connected to that attack.<sup>618</sup> Only the attack, not the individual acts of the accused, must be widespread or systematic.<sup>619</sup>

190. The second requirement to be established as part of the “nexus” requirement is the knowledge of the accused that there is an attack on a civilian population and that his or her acts are part thereof. Evidence of knowledge depends on the facts of a particular case; as a result, the manner in which this legal element may be proved may vary from case to case.<sup>620</sup> It does not suffice that an accused knowingly took the risk of participating in the implementation of a policy.<sup>621</sup> Nevertheless, the accused need not know the details of the attack or approve of the context in which his or her acts occur.<sup>622</sup> The accused merely needs to understand the overall context in which his or her acts took place.<sup>623</sup> The motives for the accused’s participation in the attack are irrelevant<sup>624</sup> as well as whether the accused intended his or her acts to be directed against the targeted population or merely against his or her victim, as it is the attack, not the acts of the accused, which must be directed against the targeted population, and the accused need only know that his or her acts are parts thereof.<sup>625</sup>

## 2. Findings

191. The nature of the “attack” alleged by the Prosecution in this case covers a set of circumstances considerably different from those considered previously by this Tribunal when dealing with the application of Article 5. Due to structural factors and organisational and military capabilities, an “attack directed against a civilian population” will most often be found to have occurred at the behest of a State. Being the locus of organised authority within a given territory, able to mobilise and direct military and civilian power, a sovereign State by its very nature possesses the attributes that permit it to organise and deliver an attack against a civilian population; it is States which can most easily and efficiently marshal the resources to launch an attack against a civilian population on a “widespread” scale, or upon a “systematic” basis. In contrast, the factual situation before the Chamber involves the allegation of an attack against a civilian population perpetrated by a non-state actor with extremely limited resources, personnel and organisation.

<sup>618</sup> *Tadić* Jurisdiction Decision, para 251; para 271; *Naletilić* Trial Judgement, para 234; *Kunarac* Appeals Judgement, para 100.

<sup>619</sup> *Kordić* Appeals Judgement, para 94.

<sup>620</sup> *Blaškić* Appeals Judgement, para 126.

<sup>621</sup> *Blaškić* Appeals Judgement, paras 125-126.

<sup>622</sup> *Kunarac* Appeals Judgement, para 102

<sup>623</sup> *Kordić* Trial Judgement, para 185.

<sup>624</sup> *Tadić* Appeals Judgement, paras 248-272 quoted in *Kunarac* Appeals Judgement, para 103: the Appeals Chamber considered that “[a]t most, evidence that [acts were committed] for purely personal reasons could be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack.”

<sup>625</sup> *Kunarac* Appeals Judgement, para 103.

233. Because Counts 1, 2, 3, 5, 7 and 9 have been dismissed, the Chamber will proceed in evaluating the evidence relating to the offences of torture under Article 3 of the Statute when dealing with Count 4, cruel treatment under Article 3 of the Statute when dealing with Count 6, and murder under Article 3 of the Statute when dealing with Counts 8 and 10.

#### 4. Torture (Count 4)

234. The Indictment charges the three Accused, *inter alia*, with torture as a violation of the laws or customs of war pursuant to Article 3, and as a crime against humanity pursuant to Article 5, of the Statute.

235. The law on torture is well settled by the jurisprudence of the Tribunal. For the crime of torture to be established, whether as a war crime or as a crime against humanity,<sup>723</sup> the following three elements must be met:

(1) There must be an act or omission inflicting severe pain or suffering, whether physical or mental;

(2) The act or omission must be intentional; and

(3) The act or omission must have been carried out with a specific purpose such as to obtain information or a confession, to punish, intimidate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person.<sup>724</sup>

236. An act or omission may constitute the *actus reus* of torture if it has caused severe pain or suffering. Mistreatment which does not rise to this level of severity may nevertheless constitute another offence under the jurisdiction of the Tribunal.<sup>725</sup> Further, it is not required that the act or omission has caused a permanent injury,<sup>726</sup> nor is there a requirement that the act or omission has caused a physical injury, as mental harm is a prevalent form of inflicting torture.<sup>727</sup>

237. With respect to the assessment of the seriousness of the acts charged as torture, previous jurisprudence of the Tribunal has held that this should take into account all circumstances of the case and in particular the nature and context of the infliction of pain, the premeditation and institutionalisation of the ill-treatment, the physical condition of the victim, the manner and the

<sup>723</sup> The definition of the offence is the same regardless of the Article of the Statute under which the accused has been charged. See *Brdanin* Trial Judgement, para 482; *Krnjelac* Trial Judgement, para 178; *Furundžija* Trial Judgement, para 139.

<sup>724</sup> *Kunarac* Appeals Judgement paras 142, 144 confirming *Kunarac* Trial Judgement, para 497. See also *Brdanin* Trial Judgement, para 481, *Krnjelac* Trial Judgement, para 179.

<sup>725</sup> *Čelebići* Trial Judgement, para 468; *Krnjelac* Trial Judgement, para 181.

<sup>726</sup> *Kvočka* Trial Judgement, paras 148.



method used and the position of inferiority of the victim.<sup>728</sup> Also relevant to the Chamber's assessment is the physical or mental effect of the treatment on the victim, the victim's age, sex, or state of health.<sup>729</sup> Further, if the mistreatment has occurred over a prolonged period of time, the Chamber would assess the severity of the treatment as a whole.<sup>730</sup> Finally, this Chamber concurs with the finding of the *Čelebići* Trial Chamber, made specifically in the context of rape, that in certain circumstances the suffering can be exacerbated by social and cultural conditions<sup>731</sup> and it should take into account the specific social, cultural and religious background of the victims when assessing the severity of the alleged conduct.

238. As for the *mens rea* required for the crime of torture, the previous jurisprudence of the Tribunal establishes that direct intent is required: the perpetrator must have intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims.<sup>732</sup> It is irrelevant that the perpetrator may have had a different motivation, if he acted with the requisite intent.<sup>733</sup>

239. For the crime of torture to be established, the alleged act or omission must have been carried out with a specific purpose: to obtaining information or a confession, or to punish, intimidate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person. The prohibited purpose needs not be the sole or the main purpose of the act or omission in question.<sup>734</sup>

240. And finally, the Chamber notes that while the earlier jurisprudence of the Tribunal has reached different conclusions as to whether, for the crime of torture to be established, the alleged act or omission must be committed by, or at the instigation of or with the consent or acquiescence of an official or person acting in an official capacity,<sup>735</sup> this issue is now settled by the Appeals Chamber. Under customary international law and the jurisprudence of the Tribunal it is not necessary that the perpetrator has acted in an official capacity.<sup>736</sup>

<sup>727</sup> *Kvočka* Trial Judgement, paras 149.

<sup>728</sup> *Krnjelac* Trial Judgement, para 182.

<sup>729</sup> *Kvočka* Trial Judgement, para 143.

<sup>730</sup> *Krnjelac* Trial Judgement, para 182.

<sup>731</sup> *Čelebići* Trial Judgement, para 495.

<sup>732</sup> *Kunarac* Appeals Judgement, para 153.

<sup>733</sup> *Kunarac* Appeals Judgement, para 153.

<sup>734</sup> *Kunarac* Appeals Judgement, para 155, *Kvočka* Trial Judgement, para 153; *Krnjelac* Trial Judgement, para 184.

<sup>735</sup> See for example *Čelebići* Trial Judgement, para 494 and *Kvočka* Trial Judgement, paras 137-141.

<sup>736</sup> *Kunarac* Appeals Judgement, para 148; *Kvočka* Appeals Judgement, para 284.

## VI. RESPONSIBILITY OF THE ACCUSED

### A. Law on the forms of liability charged

508. It is alleged that the three Accused are responsible, under Article 7(1) of the Statute, for planning, instigating, ordering, committing, including through participation in a joint criminal enterprise, or otherwise aiding and abetting the planning, preparation, or execution of the crimes charged in the Indictment.<sup>1670</sup> The Accused Fatmir Limaj and Isak Musliu are also alleged to be criminally responsible, pursuant to Article 7(3) of the Statute, as superiors of the KLA members operating in the Llapushnik/Lapusnik prison camp.

#### 1. Responsibility under Article 7(1) of the Statute

##### (a) Committing

509. "Committing" a crime "covers physically perpetrating a crime or engendering a culpable omission in violation of criminal law".<sup>1671</sup> The Appeals Chamber has held that Article 7(1) "covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law."<sup>1672</sup> The *actus reus* required for committing a crime is that the accused participated, physically or otherwise directly, in the material elements of a crime provided for in the Statute, through positive acts or omissions,<sup>1673</sup> whether individually or jointly with others. The requisite *mens rea* is that the accused acted with an intent to commit the crime, or with an awareness of the probability, in the sense of the substantial likelihood, that the crime would occur as a consequence of his conduct.

##### (b) Committing through participation in a joint criminal enterprise

510. Individual criminal responsibility arises under Article 7(1) of the Statute not only in respect of persons who perform the criminal act, but also, in certain circumstances, in respect of those who in some way make it possible for the perpetrator physically to carry out that act.<sup>1674</sup> When a number of persons are involved in a common plan aimed at the commission of a crime, they can be convicted of participation in a joint criminal enterprise ("JCE") in relation to that crime. Co-perpetration in the context of a joint criminal enterprise differs from aiding and abetting. Where the aider and abettor only knows that his assistance is helping a single person to commit a single crime, he is only liable for aiding and abetting that crime. This is so even if the principal perpetrator is

<sup>1670</sup> Indictment, para 6.

<sup>1671</sup> *Krstić* Trial Judgement, para 601; *Tadić* Appeals Judgement, para 188; *Kunarac* Trial Judgement, para 390.

<sup>1672</sup> *Tadić* Appeals Judgement, para 188.

<sup>1673</sup> *Kordić* Trial Judgement, para 376.

743. The Chamber finds the Accused Isak Musliu **NOT GUILTY** on all counts in the Indictment. Pursuant to Rule 99(A) of the Rules, the Chamber orders that Isak Musliu be immediately released from the United Nations Detention Unit.

Done in English and French, the English text being authoritative.

Dated this thirtieth day of November 2005  
At The Hague  
The Netherlands

\_\_\_\_\_  
Judge Kevin Parker  
Presiding

\_\_\_\_\_  
Judge Krister Thelin

\_\_\_\_\_  
Judge Christine Van Den Wyngaert

[Seal of the Tribunal]